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IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana: LINLEY E. PEARSON, Attorney General of Indiana, and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners.

vs.

GLEN THEATRE, INC., *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*.

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTIONS (2) AND AMICUS CURIAE BRIEF OF JAMES J. CLANCY, ATTORNEY AT LAW, IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

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December 4, 1990

IN THE

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October Term, 1990

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AMICUS CURIAE BRIEF OF JAMES J. CLANCY, ATTORNEY AT LAW, IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OUT OF TIME; AND, MOTION FOR LEAVE TO ARGUE AS AMICUS CURIAE THE DEFENSE OF LACK OF FEDERAL JURISDICTION UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULES 12(b)(1) AND 12(b)(6); OF JAMES J. CLANCY, ATTORNEY AT LAW, IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

During the first week in November 1990, Moving Party had occasion to examine the pleadings on file herein and discovered that:

(1) the federal civil rights action filed by Glen Theaters, Inc. et al, in the United States District Court under 42 U.S.C. section 1983 was in fact an improper collateral attack on the state court judgment in Indiana v. Baysinger, 272 Ind. 236, and, as such, was subject to the jurisdictional bar established in Huffman v. Pursue Ltd., 420 U.S. 592;

(2) the Petitioner Michael Barnes, Prosecuting Attorney of St. Joseph County, Indiana was not aware that this Huffman Eleventh Amendment bar was available to the State of Indiana, because of the obscure manner in which the jurisdictional bar is "framed" in the Huffman opinion (last paragraph of Justice Rhenquist's opinion), see Associate Justice Kennedy's concurring opinion in World Famous Drinking

Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084, discussed at pages 37-39 of the attached Brief Amicus Curiae;

(3) the Huffman jurisdictional bar is still a live but "undiscovered" issue in this Court (see Brief Amicus Curiae at page 11 and Appendix G-15 and G-16.

At the time of the above discovery, Moving Party was engaged in legal research for a City Attorney's Office which is defending against the same type of improper "collateral attack" in a Civil Rights action filed by an "adult bookstore" in the United States District Court under 42 U.S.C. section 1983.

In that case, the Civil Rights action collaterally attacked an order of the City Council, which had revoked the adult bookstore's business license on the ground of fraud, following a full adversary hearing. Although the municipal code specifically authorized a direct appeal of the City Council's

decision to the state court, and the City Council had stayed its revocation order to allow the adult book store to appeal its decision directly to the state court, the adult bookstore ignored the state procedure and the judicial remedy it provided, and filed the federal civil rights action in the United States District Court pursuant to which it obtained a preliminary injunction against further city action.

As in the petition for writ of certiorari herein by the Prosecuting Attorney of St. Joseph's County, Indiana, the City Attorney's office also was unaware of the jurisdictional bar simply because of the obscure manner in which that jurisdictional bar is presented in the Huffman opinion.

The confusion among jurists as to the significance of Huffman, noted by Associate Justice Kennedy in the City of Tempe case, supra, is shared by the parties. Not only are plaintiffs

generally unaware that Huffman is a bar to such a collateral federal attack, the governmental attorneys themselves are also unaware that Huffman is available to defeat the federal lawsuit by requiring that the constitutional issue be tried in the state court.[1] This misunderstanding of the law results in a

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[1] The City Attorney's Office has since concurred in the analysis of the Huffman jurisdictional bar which is set forth in the attached Amicus Curiae Brief, and has moved the United States District Court under Huffman, supra, and under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the civil rights lawsuit for lack of federal jurisdiction of the subject matter, and failure to state a claim upon which federal relief can be based; and has requested the Court to issue an order to show cause why the video outlet should not be required to address its claims in its answer to the state declaratory judgment lawsuit which the City has since filed in the state court (which addresses the same issues that are raised in the federal civil rights lawsuit).

multiplicity of lawsuits, which hamstring state law enforcement efforts to properly discharge responsibilities and duties owed its citizens under the state police power. The confusion surrounding the nature and extent of the Huffman jurisdictional bar is an issue which urgently needs resolution.

Having determined that the Huffman jurisdictional bar should be brought to the attention of this Court, Moving Party commenced work on an amicus curiae brief and obtained the oral consents of Petitioners and Respondents to file an Amicus Curiae Brief in Support of Petitioners. Upon its completion, Moving Party became aware that its contents would not be readily and fully comprehended unless copies of the eight briefs on file in this Court, to which Moving Party refers and of which this Court is requested to take judicial notice, were made available for immediate reference of the members of

the Court and parties as appendices to the brief. Without a reference to concrete examples of the problems which have been created in other situations where this Court has delayed making the "decision" which is needed to be made, it is difficult to comprehend the urgent need to examine and clearly define the Eleventh Amendment rationale upon which the Huffman jurisdictional bar is based. See Ex Parte Young, 209 U.S. 123 (1908) and Brief Amicus Curiae at 11-15, 27-34, and 37-39.

As appellant Huffman argued in his "Brief for Appellants" at Point III(A): "It was the intent of Congress at that time that those sections (civil right statute) should not be interpreted as a general federal Tort law authorizing interference with what traditionally are matters for the State Courts." The opposite "practice" has developed, governmental attorneys are unnecessarily burdened, and the federal courts are

clogged with improper filing, such as Barnes v. Glen Theater, Inc. et al. herein.

The burden of preparing multiple copies of the Amicus Brief and Appendices A through I (Huffman, Vixen, Rabe, Jartech, and Gow pleadings), and slow performance of Moving Party's xerox 3107 duplication machine made it impossible to file this Brief Amicus Curiae by the November 15, 1990 deadline. Accordingly, Moving Party informed the Petitioners and Respondents that his Amicus Brief on the jurisdictional bar would be filed in support of neither party and requested their consent in writing, which was given.

Moving Party submits that the attached Amicus Curiae Brief, which introduces the issue of "lack of federal jurisdiction" under Huffman, meets the "content" requirement of Rule 37.1 of the United States Supreme Court,

reading:

> "37.1. An amicus curiae brief which brings relevant matter to the attention of the court that has not already been brought to its attention by the parties is of considerable help to the Court..."

Because it is important that Huffman, supra, should be properly understood, this Court should grant Moving Party's motion for leave to file the attached Brief Amicus Curiae out of time. From a technical standpoint, Rule 37.3 would authorize such filing as timely, were it "treated" as a brief amicus curiae in support of the Respondents. Written consent of the parties is being filed with the Court concurrently with this motion.

Moving Party also moves the Court, pursuant to Rule 28.7, for leave to argue as Amicus Curiae the "jurisdictional bar" which was established in Huffman v. Pursue Ltd.,

420 U.S. 592 at 612. See Stern, Gressman, and Shapiro, Supreme Court Practice (6th Ed.) at page 590.

Pursuant to rule 29.2 of this Court, Moving Party on December 15, 1990 filed 40 copies of a bound volume with the Clerk of this Court, attention Deputy Clerk W.V. Gullickson, containing: (1) a 65 page Amicus Curiae Brief raising the 11th Amendment jurisdictional issue; (2) a Motion for Leave to File an Out of Time Amicus Curiae Brief; (3) a Motion for Leave to Argue the 11th Amendment jurisdictional question; and (4) Appendices A through I, containing copies of records of this Court in other cases as to which the court is requested to take judicial notice. On Wednesday, December 19,1990, a phone call was received in which Deputy Clerk W.V. Gullickson informed Moving Party that the Clerk's office had interpreted Appendix A through I, which contained copies of other records of

this Court, as being a part of the argument in the brief, which therefore exceeded the 65 page limit; that such required that the Brief Amicus Curiae and the two Motions be severed from the Appendix and filed separately with the Clerk of the Court, who would make the Appendix available for the use of any member of the Court who might request use of the same. As required by the Clerk's action, Moving Party has severed the Brief Amicus Curiae and the two accompanying Motions from the Appendix and is filing the same with this Court, pursuant to Rule 29.2.

Moving Party submits that the 11th Amendment jurisdictional question raised herein is of such overriding importance to the federal-state relationship, that the individual justices, pursuant to their sworn duty to follow and apply the Constitution, should themselves, and independently of these motions or any action by the parties, consider and

answer with finality the 11th Amendment jurisdictional question raised herein. Moving Party submits that it was not within the contemplation of the founding fathers, at the time of the 11th Amendment enactment, that an individual such as strip-teaser Darlene Miller et al. should be permitted to sue the attorney general of the state in a federal court collateral attack against a "Sir Charles Sedley" model state statute (which is aimed at controlling public lewdness), which has been found to be facially constitutional as a matter of law. In such a case, the Ex Parte Young fiction has absolutely no relevance, and a federal court clearly has no jurisdicition to consider such a sham pleading. To avoid the jurisdictional issue herein would only promote the distortion of the law that presently exists in the federal-state relationship.

As was stated by this Court in

Brown Shoe Co. v. U.S., 370 U.S. 294, 8 L.Ed.2d 510 at 524, 82 S.Ct. 1502 (June 25, 1962):

> "...a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before us..."

Furthermore, it has always been the practice of this Court to consider the jurisdictional question before reaching the merits. In Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 209, 10 L.Ed.2d 297, 300, 83 S.Ct. 1185 (May 13, 1963) this Court noted:

> "...At the outset we are met with an issue which is said to be jurisdictional...as is our practice we will consider this threshold question before reaching the merits..."

Dated: December 22, 1990.

Respectfully Submitted,

James J. Clancy
Amicus Curiae

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MICHAEL BARNES, Prosecuting Attorney of
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This Amicus Curiae Brief in Support of Neither Petitioners nor Respondents is being filed pursuant to Rule 37.3 of the Supreme Court. Written consent of the parties will be filed with this Court concurrently with this Brief.

INTEREST OF AMICUS CURIAE

Amicus Curiae James J. Clancy is a Los Angeles attorney admitted to practice in this Court in 1972 pursuant to the Motion and recommendation of Charles H Keating, Jr. Amicus is also a member of the Roman Catholic faith and the Los Angeles Archdiocese Commission on Obscenity and Pornography recently formed by Archbishop Roger Mahony.

At the present time, Amicus is providing pro bono legal services to Linda Marchiano (who appeared in pornographic films under the name "Linda Lovelace") and the parents of the late Colleen Applegate (who appeared in pornographic films under the name "Shauna Grant") in their efforts: (1) to void the federal copyrights under which the federal government has been granting benefits to the producers of obscene video tapes such as "Deep Throat" and "Virginia," and (2) to suppress and terminate the re-broadcasts

of the malum in se acts of public indecency[1] performed in the past by pornographic actors and actresses during the filming of such "copyrighted" obscene motion pictures films (now indelibly recorded on the master negative and positive print copies of such "copyrighted" films)[2], which are being used daily for continuous and repetitive re-broadcast in violation of

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1/ Black's Law Dictionary, Revised 4th Ed., defines "malum in se" as: "Malum in se. A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. Story, Ag. section 346. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280, 287."

2/ See Appendix "I" to this Brief, containing the contentions of Amicus Curiae James J. Clancy in Petition for Writ of Certiorari in James J. Clancy, et al. v. Jartech, Inc., et al, No. 81-2094, October Term 1981 at Subject Index, pages 1-36, fn. 3 at page 36, and 63-64, petition denied in 459 U.S. 826, 74 L.Ed.2d 62, 103 S.Ct. 58 (October 4, 1982); 459 U.S. 879, 74 L.Ed.2d 143, 103 S.Ct. 175 (October 4, 1982); 459 U.S. 1058, 74 L.Ed.2d 624, 103 S.Ct. 477 (November 29, 1982).

state and federal public indecency and state and federal public nuisance laws. Linda Marchiano participated as "Linda Lovelace" in the filming of the notorious hard-core pornographic film "Deep Throat," and Colleen Applegate performed as "Shauna Grant" in the filming of "Virginia," an equally notorious hard-core pornographic film which introduced one of the first of what has since become a burgeoning flood of obscene films depicting the theme of incest, in which the central film characters "act out" incestuous sexual relations involving hard-core sex acts, graphically depicted, between father and daughter. The interests of Linda Marchiano (a.k.a. "Linda Lovelace") and the parents of Colleen Applegate (a.k.a. "Shauna Grant") will be affected by what this court says regarding the powers of individual state governments to regulate malum in se acts of public indecency (see footnote 1 on page 3, supra) which

are portrayed in public, either live in three dimension, or on motion picture film in two dimension form.

Approximately thirty years ago, while engaged as a Deputy City Attorney, in Burbank, California in the defense of complicated eminent domain proceedings, Amicus was given the additional burden of defending a mandamus writ seeking the return of 400,000 hard-core pornographic paperbacks, seized under a search warrant, which had been printed, bound and warehoused in Burbank by an individual who was under indictment in Alameda County, California for the crime of conspiracy to manufacture obscene paperbacks. After this introduction to the pornographic trade and an unsuccessful defense of that case, Amicus was asked to prepare a tract for the League of California Cities, in which he expressed his personal concern for the manner in which this legal problem was being treated in the

Courtrooms throughout the United States.

A copy of that tract on "obscenity" [3] reached Charles H Keating, Jr., the founder of Citizens for Decency Through Law, who succeeded in convincing Amicus that he should use his legal talent to assist members of law enforcement and those members of the general public who were similarly concerned with the judicial treatment being accorded conduct involving "public indecency" and "obscenity," including situations where a claim was being made by the pornographic trade that, as in this case, such proscribed conduct when performed as part of a motion picture film, book, performance, etc.: (1)

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[3] A copy of that tract is being lodged with the Clerk of this Court. The Burbank-Aday case in the Burbank Municipal Court, S. 114, is discussed at page 67 of the tract and is reported as Aday v. Municipal Court for Burbank Judicial Dist. (1962, 2d Dist.) 210 Cal.App.2d 229, 26 Cal.Rptr. 576.

constituted "expression" which is protected by the First Amendment to the federal Constitution, and (2) cannot be regulated by the police power of the State except by proving that the film, book, performance, etc., itself is "obscene." See Appendix B to this Brief at pp. 5-18. Due largely to the prudent and dedicated leadership of Charles H Keating, Jr., amicus was thereafter afforded a unique opportunity during the 27 year period from 1963-1990, to express that concern to this Court as the co-author of amicus curiae briefs or counsel of record and author of briefs and other pleadings filed in over 56 cases which reached the docket of this Court. A list of those 56 cases is set forth at Appendix A-9 through A-14 to this brief.

Amicus requests the members of this Court to take judicial notice of the records of this Court [see Supreme Court Practice, by Stern, Gressman, and

Shapiro, Sixth Edition, at section 12.11 on p. 540] and arguments on improper federal interference, which challenge federal (subject matter) jurisdiction and support the tenth amendment (police power) and the eleventh amendment (right to have important state interests adjudicated in a state court), appearing in the cases described in Appendix A of this brief, in the context in which they were made, insofar as they specifically address the Constitutional questions which are now before this Court in its grant of a writ of certiorari.. Amicus has made reference to such records and relies upon the same in his arguments in this brief. See also: Appendix B through H of this brief which contains a copy of the following pleadings in certain of those cases, for reference by the members of this Court and Counsel of Record herein:

1. Motion to Affirm of Appellee

Charles H Keating, Jr. in A Motion Picture Film Entitled "Vixen," Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H Keating, Jr., October Term, 1971, No. 71-599, at pp. 1-26. See copy at Appendix "B" to this Brief. See also: State of Ohio ex rel. Keating v. A Motion Picture Film Entitled "Vixen" et al., 27 Ohio St.2d 278, 56 Ohio Ops.2d 165, 272 N.E.2d 139, vacated and remanded on other grounds in A Motion Picture Film Entitled "Vixen" et al. v. Ohio ex rel. Keating (71-599) 413 U.S. 905, 37 L.Ed.2d 1016, 93 S.Ct. 3033 (June 25, 1973), opinion adhered to on remand in 35 Ohio St.2d 215, 301 N.E.2d 880.

2. Supplemental Brief in Support of Motion to Affirm of Appellee Charles H Keating, Jr. in A Motion Picture Film Entitled "Vixen," Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H Keating, Jr., October Term, 1971, No. 71-599, at pp. 1-17. See copy at Appendix "C" to this Brief.

3. Brief Amicus Curiae of Charles H Keating, Jr. in Support of Respondent's Petition for Rehearing in Rabe v. State of Washington, October Term, 1971, No. 71-247. See copy at Appendix "D" to this Brief. See also, Rabe v. State of Washington, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.Ct. 993, reh. den. 406 U.S. 911, 31 L.Ed.2d 822, 92 S.Ct. 1604 (Mar. 20, 1972), and the dissent of Burger and Rehnquist in 405 U.S. at 317-318.

4. Petition for Rehearing of Appellee Charles H Keating, Jr. in A Motion Picture Film Entitled "Vixen," Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H Keating, Jr., October Term, 1971, No. 71-599, at Subject Index and pp. 1-19. See copy at Appendix "E" to this Brief.

5. Jurisdictional Statement of Appellants Huffman et al. in Huffman v. Pursue, Ltd., October Term, 1973, No. 73-296, at Subject Index and pp. 1-31. See copy at Appendix "F" to this Brief. See also, 415 U.S. 974, 39 L.Ed.2d 870, 94 S.Ct. 1559 (1974) which noted jurisdiction as to all questions without limitation. See Supreme Court Practice, Stern, Gressman, Shapiro, Sixth Edition at p. 299, "Without such limitation, the order noting probable jurisdiction permits briefing and arguments on all questions properly raised by the parties;" and 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), reh. den. 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969.

6. Petition for Rehearing of Appellants Huffman et al. in Huffman v. Pursue, Ltd., October Term, 1973, No. 73-296, at Subject Index and pp. 1-28. See copy at Appendix "G" to this Brief.

7. Petition for Rehearing of Petitioner in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., October Term, 1985, No. 85-439, at Subject

Index and pp. 1-16. See Copy at Appendix "H" to this Brief.

STATEMENT OF FACTS

Amicus adopts as his own the Statement of Petitioners at pages 3-9 of the Brief for Petitioners, which is set forth at Appendix A-1 through A-7 to this Brief, and supplements the same with one additional fact; namely, that at the outset of the trial in 1985, U.S. District Judge Allen Sharp rejected a "Huffman" challenge to federal (subject matter) jurisdiction, see Glen Theatre v. Civil City of South Bend, 726 F.Supp. 728 (1985) at 730, which, in the view of this Amicus, is never waived and constitutes reversible error under the 9th, 10th, and 11th Amendments to the United States Constitution.

STATEMENT OF THE CASE (ISSUES)

During the past 27 years, Amicus has repeatedly attempted, without success, to get a majority of this

Court's membership to require the Court as a whole to examine the two fundamental issues which, for the first time, are now squarely before this Court; namely, (1) whether a state statute,[4/] such as a public indecency or a moral public nuisance abatement statute, which on its face constitutes a proper exercise of a state's police power to regulate sexual conduct in

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[4/] The "common law" right to proscribe lewd conduct as "public indecency" predates the federal constitution and the First Amendment and stems from the Common Law Crime, first recognized as a separate offense in 1663 when Sir Charles Sedley was brought before the common law courts on a breach of the peace charge for "exposing" himself in the nude on the balcony of a tavern in Covent Garden, England, 1 Sid 1688. Common law crimes rested upon general reception and usage and were established by showing that it always had been the custom in the community to observe the standard of conduct which had been violated. On that occasion, Sedley urinated onto the courtyard below and delivered an obscene and blasphemous speech. In that case, the common law courts declared Sedley's conduct to be a common law crime which is now codified in Indiana's public indecency statute.

public, involves a sovereign right which, under the eleventh amendment, may not be interfered with by the federal courts; and (2) whether, given the additional factors that the important state interest here involves the tenth amendment (state sovereignty) and the eleventh amendment (right to have such issue tried in the state courts), the jurisdiction to inquire into the constitutionality of a statute of this type (which has been determined to be facially constitutional), as applied to the specific conduct of an individual, is exclusively in the state courts and is not subject to the Ex Parte Young, 209 U.S. 123 (1908) fiction, and may not be interfered with by a federal court under a First Amendment claim that such proscribed sexual conduct and the portrayal thereof is no longer subject to that sovereign power because it is made under a claim that it is "expressive speech" under the First

Amendment to the Federal Constitution.

SUMMARY OF ARGUMENT

Amicus contends that the answers to the above claims are: (1) The right of a state to regulate sexual conduct in public is a fundamental "natural law," and "common law" right enjoyed by the citizens of every town, village, county and city, such as South Bend, Indiana, and collectively, is possessed by the individual state governments, which has existed from time immemorial and certainly long before the enactment of the First Amendment to the Federal Constitution, and was preserved and reserved to the States under the Ninth and Tenth Amendments; and (2) Jurisdiction to interpret and apply the meaning and scope of a state statute regulating sexual conduct in public, which is facially valid, to specific conduct of an individual, is exclusively in the state courts, is a preemptive

matter of state sovereignty which is guaranteed by the Eleventh Amendment and is not subject to the Ex Parte Young fiction, see pages 28-29, infra, which does not depend upon whether there is an ongoing state judicial proceeding, and may not be interfered with by a federal court.

The federal complaint and proof adduced below is the same type of collateral attack on the Indiana Supreme Court's definitive interpretation and judgment in Indiana v. Baysinger, 397 N.E.2d 580 (Ind. 1980) (re "nude dancing") as the collateral attack on the Ohio Common Pleas (trial court) ruling and judgment on "closure" in Huffman v. Pursue, Ltd., 420 U.S. 592, at 612. See Point III(H)(1) "The Huffman Appeal (Civil Case)," infra, at pp. 51-56, and the further discussion at pages 24-25.

A subsidary question, not previously addressed in the briefs in

the above described 56 cases, relates to the role of the federal trial court if this Court holds that the trial facts negate federal jurisdiction and preclude federal interference, i.e. whether trial Judge Allen Sharp's findings of fact and conclusions of law on the issue of law not answered by the Indiana Supreme Court in Indiana v. Baysinger, 397 N.E.2d 580 (Ind. 1980), appearing at 695 F.Supp. 414, at 419, which are outside Judge Sharp's limited jurisdiction (i.e. "jurisdiction to determine jurisdiction"), must be vacated for lack of jurisdiction and failure to state a federal claim upon which relief can be based.

Amicus contends that, in view of the South Bend, Indiana's Huffman challenge to basic federal (subject matter) jurisdiction which is never waived, Judge Sharp's findings of fact and conclusions of law do constitute an unconstitutional interference with the

Indiana Supreme Court's exclusive right to make a determination of the meaning and application of the statute to these specific facts. However, his findings of fact and conclusions of law are relevant in the sense that they negate federal (subject matter) jurisdiction. Succinctly, the federal court, in examining the pleadings and proof in relation to its "jurisdiction to determine jurisdiction," can determine abstractly on that limited jurisdictional issue that Plaintiffs' strip-teasing, as a matter of law, is malum in se "conduct" and does not and cannot constitute "expressive" speech, and that any state public indecency statute (which codifies the law expressed in 1663 in Sir Charles Sedlys Case) can be applied to proscribe the strip-tease dance appearing in the video tape, herein stipulated to by the parties, without offending the federal constitution.

ARGUMENT

I

THE RIGHT OF A STATE TO ADDRESS AND REGULATE SEXUAL CONDUCT IN PUBLIC IS A FUNDAMENTAL RIGHT, ENJOYED BY THE CITIZENS OF EVERY TOWN, CITY, VILLAGE, ETC. THE POWER TO ENFORCE THOSE RIGHTS WHICH ARE COLLECTIVELY POSSESSED BY BY THE INDIVIDUAL STATE GOVERNMENTS, EXISTED LONG BEFORE, AND WAS NOT AFFECTED BY, THE ENACTMENT OF THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION.

The correctness of the above proposition of law is so basic as to require no citation of authority other than the concession of Mr. Justice Douglas, speaking in his dissenting opinion in Alberts v. California, 354 U.S. 476 at 512. See, in this regard, the analysis of United State Court of Appeals Judge Bowman, speaking for a plurality of the Eighth Circuit (Bowman, Dumbauld and Lay) which, in Walker Jr. v. City of Kansas City, Missouri, 911 F.2d 80 at 86 (CA 8, 1990), came to a conclusion contrary to the en banc decision of the Seventh Circuit below in

Miller v. Civil City of South Bend, 904 F.2d 1081 (CA 7, 1990). There, Circuit Judge Bowman held at pages 86:

> "Even Justice Douglas--famous for his dissents in many First Amendment cases (including each of the cases quoted above) in which he asserted that any number of pornographic items constituted protected speech [fn. omitted] --apparently would have drawn the line at 'exotic' dancing. Thus, he wrote: 'I assume there is nothing in the Constitution which forbids Congress from ... proscrib[ing] conduct on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places....' Roth v. United States, 354 U.S. 476, 512, 77 S.Ct. 1304, 1323, 1 L.Ed.2d 1498 (1957) (Douglas, J., dissenting) (emphasis added to second sentence). In a later case -- and later dissent -- Justice Douglas noted the historical roots of the distinction he drew between sexually explicit -- indeed obscene -- literature and actual people shedding their clothes in public places:
>
> > The first reported case involving obscene conduct was not until 1663. There, the defendant was fined for 'shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Covent Garden, contra pacem, and to the scandal of the Government.' Sir Charles Sydleys Case, 83 Eng.Rep. 1146-1147 (K.B. 1663). Rather

than being a fountainhead for a body of law proscribing obscene literature, later courts viewed this case simply as an instance of assault, criminal breach of the peace, or indecent exposure. E.g., Bradlaugh v. Queen, L.R. 3 Q.B. 569, 634 (1878); Rex v. Curl, 93 Eng.Rep. 849, 851 (K.B. 1727) (Fortescue, J., dissenting).

United States v. 12 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123, 134, 93 S.Ct. 2665, 2672, 37 L.Ed.2d 500 (1973) (Douglas, J., dissenting). If there is a distinction between Sir Charles's disrobing and the go-go girls' performance at the Last Chance Lounge, it at least cannot be said that that distinction lies in the lack of expressiveness of Sir Charles's conduct." (Our emphasis.)

Sir Charles Sedleys Case became a part of the English Common Law in 1663, and was followed as a part of the Common Law in America at the time the United States Constitution became law. No one has ever argued that an attempt was made to overrule Sedley's case; rather the general understanding is that such power was reserved to the states and the people in the adoption of the Ninth and Tenth Amendments. See, in this regard,

the dissenting opinion of Circuit Judge Easterbrook below in Miller v. Civil City of South Bend, supra, at page 1124:

"The First Amendment protects 'the freedom of speech'. Go-go dancing is not 'speech'. James Madison would have guffawed had anyone suggested public nudity as an example of 'freedom of speech' -- or of anything that could be derived from the Framers' conception by a series of plausible interpretations. Parading in a state of undress is conduct, not speech. Even Justices Black and Douglas, who thought the First Amendment absolute, rendering all efforts to curtail obscene speech unconstitutional, drew the line here .... What these absolutists gave as a reductio ad absurdum, the court today holds the First Amendment commands." (Our emphasis.)

II
INDIANA CODE 35-45-4-1 IS CONSTITUTIONAL ON ITS FACE AS A MATTER OF LAW.

In State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580, at 583 (1980), the defendants claimed that their activity, "appearing nude in bars and taverns and nude dancing in bars" was entitled to First Amendment protection. There, the Indiana Supreme Court interpreted

Indiana Code 35-45-4-1 (see copy at Appendix A-1) as nothing more than a codification of Sir Charles Sedleys Case, supra, which required proof that the "nudity" be "conduct which traditionally has been held to be public indecency":

> "Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as part of some larger form of expression meriting protection, when the communication of ideas is involved. A critical part of the final issue to be decided relates to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. Appellees make no claim that there is any pure speech involved in their appearances. They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this contest. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim. The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech. Our case law has restricted and defined the type of conduct which has been prosecuted under public indecency statutes. Our statutes provide for procedures and standards to be used in a determination of obscenity when required for different materials or performances." (Our emphasis.)

Where, as here, the validity of a statute has been sustained by a State Court in the face of federal objections, this Court, on appeal, must accept the state court's construction and test the validity on that basis. General Trust Company v. Blodgett, 287 U.S. 509, 513; Kingsley Pictures Corp. v. Regents, 368 U.S. 684, 688. The appeal to this Court in Baysinger, supra, was dismissed for

want of a substantial federal question. State v. Baysinger et al., sub. nom. Clark v. Indiana, 446 U.S. 937 (1980). According to Hicks v. Miranda, 422 U.S. 332 (1975), this Court's dismissal of the Baysinger appeal for want of a substantial federal question must, at the very least, be construed as a ruling on the merits that Indiana Code 35-45-4-1 is facially constitutional.

Further, the federal complaint and proof adduced below is clearly an unconstitutional collateral attack on the Indiana Supreme court's above ruling in Baysinger, supra. See Huffman v. Pursue, Ltd., 420 U.S. 592 at 612. Although it is argued that Plaintiffs' claim of free speech protection provides a "difference" (which allegation was not made in Baysinger), Plaintiffs provided no proof whatsoever in support of that allegation. The difference between the pleading and proof in Baysinger and the pleading and proof hereinbelow is

without distinction.

At the time they filed their federal complaint, Plaintiffs' knew, as Amicus has argued herein at pages 15 that, as to any state court action and their pleading and proof, they would be concluded by Baysinger, supra. To avoid that result, they brought this federal action as a collateral attack on Baysinger. Huffman is an absolute bar, even though there is no pending state proceeding. To hold otherwise would instruct all litigants on "how" to thumb their noses at the Eleventh Amendment and avoid the rule of law expressed in Huffman.

III

THE CITY OF SOUTH BEND, INDIANA, "HUFFMAN" CHALLENGE IN THE TRIAL COURT INVOKED FOUR BASIC JURISDICTIONAL PRINCIPLES OF LAW WHICH ARE NEVER WAIVED: (1) LACK OF FEDERAL (SUBJECT MATTER) JURISDICTION; (2) FAILURE TO STATE A CLAIM ("SUBJECT MATTER") UPON WHICH RELIEF CAN BE BASED; (3) STATE SOVEREIGNTY - POLICE POWER (10TH AMENDMENT); AND (4) RIGHT TO BE SUED ONLY IN STATE COURT (11TH AMENDMENT), ALL OF WHICH WERE VIOLATED BY THE COURT OF APPEALS

ORDER OF REMAND TO THE UNITED STATES DISTRICT COURT IN 1982.

III(A). THE 1986 COURT OF APPEALS RULING THAT THE INDIANA PUBLIC INDECENCY STATUTE WAS FACIALLY CONSTITUTIONAL IS CORRECT.

That part of the 1986 Court of Appeals judgment in Glen Theatres, Inc. v. Pearson, 802 F.2d 287 (CA7 1986) (Cummings, Easterbrook, and Norris) which upheld the Indiana public indecency statute as facially constitutional under the Indiana Supreme Court's definitive interpretation in State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1980), thereby annuling the finding of a likelihood of success on Plaintiffs' claim of facial unconstitutionality, upon which trial Judge Sharp had granted the injunction [see 722 F.Supp. 728 at 731 (July 26, 1985)], was correct.

III(B). THE 1986 COURT OF APPEALS REMAND OF THE CASE TO THE UNITED STATES DISTRICT COURT, WITHOUT INSTRUCTIONS THAT THE PLAINTIFFS HAVE THE BURDEN OF PROOF AND MUST PLEAD AND PROVE THE HUFFMAN EXCEPTION FOR

FEDERAL (SUBJECT MATTER) JURISDICTION WAS REVERSIBLE ERROR.

However, the remainder of the Court of Appeals' judgment, which remanded the federal civil rights lawsuit back to the trial court for trial of the "as applied" constitutional issue, without any instructions on what to do with the plaintiffs' burden of proof under Huffman v. Pursue, Ltd. 420 U.S. 592 at 19, to meet the jurisdictional requirement of proving "extraordinary circumstances where the danger of irreparable loss is both great and immediate," was clear error. At a minimum, it was reversible error in 1986, in the face of the City of South Bend, Indiana's jurisdictional challenge under the Younger-Huffman abstention doctrine, see 726 F.Supp. at 730 (1985), to order Federal Judge Sharp to go forward on the "as applied" trial without instructions that he must first find, under his "jurisdiction to

determine jurisdiction" function, the requisite "extraordinary circumstances where the danger of irreparable loss is both great and immediate," pursuant to this Court's ruling in Huffman v. Pursue, Ltd., supra at 612, as authoritatively construed by this Court the previous year in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 at 14-17 (1985).

Further, federal jurisdiction in such cases is dependent upon the "fiction" created in Ex Parte Young, see pages 14-15, supra, that the Attorney-General is violating the constitution and, thus, the lawsuit is against a private individual rather than against the state in violation of the Eleventh Amendment. When the federal court entered its 1986 judgment that the Indiana Indecency Statute was susceptible of a constitutional interpretation and was facially constitutional, the "fiction" of Ex

Parte Young was dispelled and the jurisdiction of the federal court was exhausted. At that point, the federal court was under the constraints imposed by the Tenth and Eleventh Amendments and had no power to "stay" its lack of jurisdiction and was required to dismiss the lawsuit.

III(C) UNDER ITS DE NOVO REVIEW, THE COURT OF APPEALS IN 1986 SHOULD HAVE RECOGNIZED THAT PLAINTIFFS' CLAIM, THAT "STRIP TEASING" WAS "EXPRESSIVE CONDUCT" WHICH WAS PROTECTED BY THE FIRST AMENDMENT, WAS A SHAM, AND SHOULD HAVE DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH FEDERAL RELIEF COULD BE GRANTED.

The video tape (see Appendix A-5 to this brief at fn. 2) which was before the Court of Appeals in 1986 is patent that Plaintiffs' claim was spurious as a matter of law. Plaintiffs' claim that such "nude barroom dancing" was "expressive speech" under the federal constitution is no different that the claim regarding "appearing nude or

performing a nude dance" ... which was proscribed in Baysinger, supra, see pages 21-25, supra, and their success in the Seventh Circuit Court of Appeals En Banc decision, is analogous to the claim of the shrewd tailors in Hans Christian Anderson's tale of the vain Emperor in the "Emperor's New Clothes," where the tailors claimed they possessed an exquisite, invisible cloth from which they could tailor the finest suit of clothes in the kingdom - which all would recognize except fools and those who could not do their jobs. Plaintiff's complaint and the proof adduced thereunder is clearly a collateral attack on Baysinger, supra, and this Court's opinion in Huffman, supra, is controlling.

Under de novo review, see World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987), at 1081, the Seventh Circuit should have ruled that under Huffman, State

Sovereignty was the central issue and should either have dismissed the Civil Rights lawsuit or ordered the Plaintiffs to file their lawsuit in the State Court.

This Court in Dallas v. Stanglin, ___U.S.___, 104 L.Ed.2d 18, 109 S.Ct. 1591 (1989) has held that social dancing (with clothes) is not "expressive activity...protected by the First Amendment." A fortiori, nude barroom dancing (without clothes) must not be protected. See Judge Easterbrook's dissenting opinion below in 904 F.2d at 1128 and 1129, and Circuit Judge Bowman's opinion in Walker Jr. v. City of Kansas City, Mo., 911 F.2d 80 at 89 (CA 8, 1990):

> "While the precise sort of dancing at issue in Stanglin was ballroom rather than 'go-go' dancing, it turns the Supreme Court's First Amendment rulings on their heads to maintain that an activity unprotected by the First Amendment when the participants are clothed acquires exalted status under that amendment if the participants shed their clothes.

> See, e.g. Young v. American Mini Theatres, 427 U.S. 50, 61, 96 S.Ct. 2440, 2447-48, 49 L.Ed.2d 310 (1976) ('[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression ....'). Indeed, as Judge Easterbrook has noted:
>
> > 'A line that distinguishes barroom dancing (protected) from ballroom dancing (unprotected) has little virtue other than avoiding inconvenient precedent such as Stanglin.'"

Continuing with that same line of reasoning, if under Baysinger, supra, "appearing nude or nude dancing" in a barroom is unprotected, then a fortiori, "appearing nude or nude dancing" with the added feature of "strip-tease" must also be unprotected.

In such an "as applied" case, United States v. O'Brien is not apposite, for a number of reasons: (1) O'Brien dealt with the facial validity of a federal statute which was under attack; here, the state statute has been declared to be constitutional on its face, in which case, the federal court's

examination and analysis of the constitutionality is limited to the concrete case before the Court. See Circuit Court of Appeals Judge Coffey's dissenting opinion in 904 F.2d at pp. 1114-1115:

> "We are concerned with an Indiana public nudity statute that has been declared valid on its face. State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979), appeal dismissed for want of a substantial federal question, 446 U.S. 931, 100 S.Ct. 2146, 64 L.Ed.2d 783 (1980). In a previous opinion we recognized the Baysinger holding as authoritative for purposes of this litigation. Glen Theatre, Inc. v. Pearson, 802 F.2d 287, 288-90 (7th Cir. 1986). Thus, this is an 'as applied' challenge where we are concerned only with the statute's application to the plaintiffs' activities. Therefore, we must 'limit our analysis of the constitutionality of the [statute] to the concrete case before us.' Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 803, 104 S.Ct. 2118, 2127, 80 L.Ed.2d 772 (1984), and speculation concerning whether or not the state might enforce this statute if the routines were 'choreographed as part of a graduate Ph.D. thesis.' Majority Opinion at 1087 [footnote omitted], if the nudity was in a 'movie,' Posner concurrence at 1104, or in 'belly dancing,' id., is simply irrelevant .... Where, as here, the only concrete example of

> enforcement of the statute contained in the record involves the conduct of the plaintiffs, we are limited solely to consideration of whether their activities are constitutionally protected from the prohibition of public nudity contained in Indiana's facially valid statute. See Vincent, 466 U.S. at 803, 104 S.Ct. at 2127 [footnote omitted];

and (2) O'Brien involved conduct [burning of a draft card] which was merely malum prohibitum.[5/] Here, the conduct -- indecent exposure of one's body -- was a crime at common law, and uniformly throughout the 50 States is malum in se. City Court of Tucson v. Law, 16 Az. 12.

5/ Black's Law Dictionary, Revised, 4th Ed., defines "malum prohibitum" as: "Malum Prohibitum. a wrong prohibited; a thing which is wrong because prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law; an act involving an illegality resulting from positive law. Contrasted with malum in se. Story, Ag. section 346; People v. Pavlic, 227 Mich. 562, 199 N.W. 373, 374, 35 A.L.R. 741." Compare fn. 2 on page 4, supra.

III(D). THE 1986 COURT OF APPEALS MISUNDERSTANDING OF HUFFMAN CAN BE TRACED TO THIS COURT'S REFUSAL IN THE LAST PARAGRAPH OF THE HUFFMAN OPINION TO EXPLAIN MORE CLEARLY THE BASIS FOR ITS INSTRUCTIONS TO THE TRIAL COURT UPON REMAND.

The above error was not so much the fault of the Court of Appeals as it was the failure of this Court to clearly articulate in its opinion ten years earlier in Huffman v. Pursue, Ltd, (1975), supra, that lack of "subject matter" jurisdiction based upon State Sovereignty and the 11th Amendment was the realistic basis of its decision. Although appellant made "subject matter" jurisdiction the primary issue of Appellant's Jurisdictional Statement in Huffman v. Pursue, Ltd., and in the Brief on the Merits and at oral argument, and this Court was under a Constitutional duty to resolve that issue on Appeal (as distinguished from its review under a writ of certiorari), this Court in 1975 refused to address

those contentions. The only clue that federal jurisdiction was the central issue was this Court's concluding paragraph in Huffman, 420 U.S. 592 at 612 (Mar. 18, 1975):

> "We therefore think that this case is appropriate for remand so that the district court may consider whether...the district court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind.

It took 10 years of additional litigation to get the members of this recalcitrant Court to clear the air. See the dissenting opinion of Stewart in Juidice v. Vail, 430 U.S. 327, 348, 51 L.Ed.2d 376, 97 S.Ct. 1211 (Mar. 22, 1977); Trainor v. Hernandez, 431 U.S. 434, 52 L.Ed.2d 486, 496, 97 S.Ct. 1911 (May 31, 1977); Moore v. Sims, 442 U.S. 415, 430, 60 L.Ed.2d 994, 1007, 99 S.Ct. 2371 (June 11, 1979); Middlesex County Ethics Committee etc. v. Garden State Bar Assn. et al., 457 U.S. 423, 73 L.Ed.2d 116, at 124-125, 102 S.Ct. 2515

(June 21, 1982) ["extraordinary circumstances": (1) ongoing state judicial proceeding; (2) do proceedings implicate important state interests; and (3) adequate opportunity in state proceedings to raise constitutional challenge]; see also Pennzoil Co. V. Texaco, Inc., 481 U.S. 1, at 14-17, 95 L.Ed.2d 1, at 18-20, 107 S.Ct. 1519, where this Court has given its most definitive ruling on Huffman.

III(E). IN A PROPER CASE, AS HERE, THERE IS NO REQUIREMENT UNDER THE HUFFMAN PRECEDENT FOR A PENDANT STATE PROCEEDINGS.

In Pennzoil Co. v. Texaco, Inc., supra, this Court noted that there is no absolute need for a pending state proceedings, and concluded, that, as of December 10, 1985, the following principle of law governed (at footnote 9, on page 16):

> "9. In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficienty to justify abstention, even if there

> are no pending state proceedings in which the question could be raised. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 85 L.Ed.2d 971, 61 S.Ct. 643 (1941).

Because this case only involves an "as applied" constitutional claim and is limited to the probative facts (the particular striptease) before the Court, Plaintiffs cannot say that they have stated a valid Constitutional claim under the Civil Rights Act upon which relief can be based. A federal adjudication on these facts would accomplish no more than a criminal trial of the alleged violation in the State Court. Further, a slight variation of the dance might result in a different verdict on the criminal trial.

There is still a great deal of confusion, which requires clarification, as to what is required by Huffman v. Pursue, Ltd. and in which cases it must be applied. See, for example, the concurring opinion of Associate Justice Kennedy in 1987, then sitting on the

Court of Appeals for the Ninth Circuit in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084 (CA 9, June 26, 1987):

> KENNEDY, Circuit Judge, concurring: "General principles of abstention are distinct from the doctrine of dismissal for lack of jurisdiction pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). Only the latter rule is applicable here, and Huffman squarely controls. I concur in the judgment [of dismissal].

III(F). FROM A "PLEADING" STANDPOINT, PLAINTIFFS HAVE FAILED TO PLEAD AND PROVE THE "EXCEPTION" FOR FEDERAL JURISDICTION TO ATTACH.

The pleadings and proof herein demonstrate that "subject matter" jurisdiction does not lie because the Plaintiffs have not stated a civil rights claim upon which federal relief can be based. Martinez v. California, 444 U.S. 277 (1980).

Under the rationale expressed in Allen v. McCurry, 449 U.S. 90 (1980), and Parratt v. Taylor, 451 U.S. 527

(1981), the intent of Congress was to establish federal jurisdiction under 42 U.S.C. Section 1983 where one of the following

three circumstances is shown to exist:

(1) The State substantive law is facially and totally unconstitutional;

(2) The State procedural law is inadequate to allow full litigation of a constitutional claim; or

(3) The State procedural law, though adequate in theory is inadequate in practice.

In this case, none of the foregoing circumstances apply. The Indiana state law is not facially unconstitutional, and the procedural law of the State of Indiana is entirely adequate to allow full litigation of all constitutional claims.

In their effort to avoid Huffman, supra, plaintiffs cannot claim that every litigant asserting a 42 U.S.C. Section 1983 federal right is entitled

to one unencumbered opportunity to litigate the federal right in a federal district court. See Allen, et al. v. McCurry, 449 U.S. 90 at 103 and 105.

As suggested by United States District Court Judge Young's analysis of Parratt, supra., in Juncker v. Tinney III, 549 F.Supp. 574, the jurisdictional question may ... be ... whether the plaintiffs have established "subject matter" jurisdiction; i.e. stated a claim upon which relief can be based, at p. 578:

> "The argument for applying Parratt to liberty and life interest (and thus for sending many purported section 1983 cases to state court) is based not upon principles of comity but upon the language of the Fourteenth Amendment and upon the concept that in certain situations a complaint fails to state a claim under the Fourteenth Amendment because the plaintiff has not been deprived of a constitutional right without due process of law. Proof of this difference lies in the different results. Under an exhaustion requirement, a plaintiff may sue in federal court after he has exhausted his state remedies. Under the Parratt analysis, if a plaintiff fails to state a claim

> under section 1983, he has no cause of action in federal court, and may sue only in state court." (Our emphasis)."

In Vickory v. Walton, 721 F.2d 1062 (CA 6th, Nov. 30, 1983), petition for a writ of certiorari denied by this Court, the Court of Appeals undertook an analysis of Parratt, supra, and held the plaintiff must plead and prove the jurisdictional requirement that the state remedies for redressing the wrong were inadequate and that, in a procedural due process case under 42 U.S.C. Section 1983, plaintiff must attack both the state corrective procedure (judicial process) as well as the substantive wrong (application of the statute to Plaintiffs by administrative officials - here, police officials), and that the plaintiff had neither alleged nor shown any significant deficiency of the state remedy. See, also, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, at 14, where

this Court noted that "the burden on this point rests on the federal plaintiff to show "that state procedural law barred presentation of its claims" ... and at page 16, where the Court stated: "Texaco has cited no statute or case clearly indicating that Texas Courts lack such power. Accordingly, Texaco has failed to meet its burden on this point." (Our emphasis.)

Applying Vickory v. Walton to the pleadings and proof in this case, Defendants have established that the administrative officials, under the Indiana Supreme Court's ruling in Baysinger, supra, would apply the statute to their nude (strip-tease) dance, but they have not shown, nor could they show, that Plaintiffs' would not be able to raise their constitutional claim in a similar state court action. Martinez v. California, 444 U.S. 277 at 285 (1980).

III(G) THERE ARE VALID PUBLIC POLICY REASONS WHY, IN VIEW OF THE "STATE SOVEREIGNTY" CONSIDERATION, THE JURISDICTION OF THE STATE COURT SHOULD BE HELD TO BE EXCLUSIVE:

(1) A federal Court lacks jurisdiction to authoritatively construe state legislation. U.S. v. 37 Photographs, 402 U.S. 363 (1973). In contrast, a state court is under a constitutional duty to construe state legislation in a constitutional manner. See People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55, at 56.

(2) State action is efficient; Federal interference promotes judicial inefficiency. Any additional judicial construction by the state courts, including an interpretation that "black" means "white," will be judicially efficient in that it will finally resolve that which now is uncertain and will be binding on the Federal Courts. Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959), at 688. The federal

result is different -- see footnote 6 and 7 of Dombrowski v. Pfister, 380 U.S. 479 at 490, and Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

(3) The cardinal principle of statutory construction is to save and not to destroy. Tilton v. Richardson, 403 U.S. 677 (1971), at 684.

(4) The question of severability is more properly a matter for the state courts. Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981), at 521.

III(H). AS THE CUSTODIAN OF PUBLIC MORALS, THE EN BANC APPEALS COURT FOR THE 7TH CIRCUIT HAS VIOLATED ITS CONSTITUTIONAL DUTY TO ARTICULATE THE COMMON LAW (NATURAL LAW) CONSENSUS ON PUBLIC MORALS THAT UNDERPINS OUR JUDEO-CHRISTIAN SOCIETY.

The en banc opinions of Justices Flaum, Cudahy, and Posner are mind-boggling examples of how far the "intellectual" positive law approach, espoused by "modern American jurists," has taken us from our roots in the Common Law tradition (Natural Law) of

England and of our forefathers. What Justices Black and Douglas gave as a reductio ad absurdum, those Justices today hold that the First Amendment commands! See page 21, supra.

Amicus is in complete disagreement with the "positive law conclusions" of the 7th Circuit justices, and urges this court to honor the approach of our Judeo - Christian "tradition" which views the world in which we live as a "great dance," in which the Divine Creator, as the "Dancer," has given mankind His promise that "if you will live in Me, I will live in you." See "Chance or the Dance, A Critique of Modern Secularism," by Thomas Howard, (Ignatius Press, 15 Oakland Ave., Harrison, N.Y. 10528) at pp. 104-108. Howard's book gives a clear description of what has gone wrong with the modern world in its soul. His inquiry: "Is this Chance, or do we Dance?" is a deep and serious discussion about the choice we "moderns" must make,

between a "Fate" driven World controlled by the "Natural Law" and "Fate," in which the dance has already begun without us (so that our only real choice is to join it or reject it) and a "Chance" driven World governed by 7th Circuit Court of Appeals' Justice Posner's "positive law" system - a World which we make for ourselves, and in which there is no ritual dance - only a world in which any action by man [no matter how worthless or heinous under Common Law Traditions] can be transformed into a modern "icon" under the ephemous label "Art." Protection is sought for such conduct under the "sacred talisman" of "Art for Arts' sake." It is a "modern world," in which any meaning, is the meaning we give to it.

In his book, "The Catholic Classics," Dinesh D'Souza explains the following distinction between such "Fate" and "Chance" driven systems, as

drawn by the classical Roman scholar Boethius in his "Consolation of Philosophy" fifteen hundred years ago:

> "If chance is defined as an event without a cause, then there is no such thing as chance, the Muse says. Indeed the ancient philosophers were right about this - nothing can come out of nothing, ex nihilo, nihil. But there is a difference between chance and fate. When a result occurs which was other than the one intended, that's fate.
>
> "Fate, however, is not quite the same thing as providence. According to the Muse, providence is divine reasoning itself; it is the planned order of things, and it is unchanging. Fate is the means by which providence achieves its objectives [through the activities of other "dancers"]; and it seems to change wildly for the individuals. (Our emphasis.)

In this "Great Dance," this Amicus has observed its operation with fascination - just about the time he begins to feel that he is "dancing" his dance by himself - suddenly, and without explanation, "fate" takes over and he finds himself engaged in his dance with other partners who, having recognized the pattern, seen his place, and

assented to it, voluntarily join with him in his "dance."

In Sir Charles Sedleys case, supra, (1663), it was said that the Court is the "custodian" of the public morals, and in James Phelan v. Commonwealth of Virginia, 12 L.Ed.2d 1030 (1850) this Court noted at page 1033:

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government ....
>
> "It is a principle of the Common Law, that the King cannot sanction a nuisance ...."

Justice Posner and the en banc majority have refused to abide by the above "traditions."

In fulfilling this Court's responsibility, Amicus respectfully urges the members of this Court to honor the pattern herein drawn by Sir Charles Sedleys Case and the Common Law Judges as assented to by the early Colonies in America, and join in a majority consensus to reestablish the Common Law principles first ennunciated in Sir

Charles Sedleys case in 1663 as a "natural law" principle which underpins our entire Federal System and will control the disposition of this and other Appeals, which are certain to be addressed to this court in the future in other forms, such as Huffman, Vixen, and Rabe which are discussed hereafter.

Amicus Curiae respectfully submits that this Court, in the past 30 years, has not found it possible, due to the philosophical disagreement of its members and inability to reach a consensus, to carry out its Constitutional duty to resolve, and set to rest the critical moral constitutional questions which underlie and have caused this problem - questions which have been before this Court in a number of forms and for which this Court has acknowledged the need for "judicial decision" by noting its Jurisdiction of such questions.

One of the unanswered question in

this "cutting edge of the law," has been this question, now before this Court, of the broad sovereign right of a state to regulate the public morality of the state. Such was the case in Huffman v. Pursue, Ltd., where the Court, as a whole, avoided the broad 11th Amendment Jurisdictional Question of "subject matter" jurisdiction which had been brought before the Court in the Jurisdictional Statement, and as to which the Court had noted Jurisdiction.

(1). THE "HUFFMAN" APPEAL (CIVIL CASE)

In Huffman, the Prosecuting Attorney filed a civil public nuisance abatement lawsuit under an Ohio statute in a Lima, Ohio, Common Pleas Court, in which it was alleged that during the 11 week period from July 12, through September 25, the defendant had shown 21 obscene motion picture films (2 per week). After trial on the merits, the trial judge on November 30, 1972,

granted a permanent injunction against the exhibition of the public nuisance (the continuous, exclusive exhibition of such obscene films) and ordered the theater closed for a year. Within 2 hours of the entry of the final judgment forfeiting the lease for a period of one year, the theater was closed and the keys seized by law enforcement. The order was a final order which, under Ohio procedures, started the statutory limitation period for filing an appeal. On the next day, December 1, 1972, the first day into the appellate process, Pursue, Ltd., a corporation which was formed by defendants for that purpose, was assigned the property and filed an action in the United States District Court, alleging a Civil Rights Action under 42 U.S.C. section 1983 which collaterally attacked the judgment on "closure" in the Ohio trial court. The federal court on that date (improperly

in Amicus Curiae's view[6]), stayed the closure order and thereafter a 3 judge court was convened which, on April 20, 1973, issued its opinion and order holding the closure under the Ohio public nuisance statute unconstitutional, and enjoining the execution of the closure order. See at Appendix F and G to this Amicus Curiae Brief the Jurisdictional Statement in No. 73-296 at page 13-21, and Subject Index and pages 2-27 of the Petition for Rehearing in No. 73-296. In its opinion on Huffman's direct appeal from the 3 judge Court's action[7], in Huffman v.

6/ The federal court order prevented a final resolution of the question as to whether, under the trial facts, "closure" was a viable remedy which was consistent with the free speech restraints of the federal and state constitution.

7/ The 3-Judge Court safeguard is no longer available to the state, having been repealed by Congress upon the advise and assurance of the Chief

(Footnote Continued)

Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, reh. den. 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969 (1975), this Court refused to address the broad "subject matter jurisdiction" question, as to which the Court had noted jurisdiction and, instead, extended the abstention rule for criminal cases in Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971) to civil actions.

In Huffman, supra, Amicus Curiae, as Counsel of Record for Appellant Huffman (and in an unsuccessful Petition for Mandamus), devoted almost one-half hour of oral argument to the broad Jurisdictional Question of "subject matter" jurisdiction which had been brought before the Court, and in which this Court had noted jurisdiction in 415

(Footnote Continued)
Justice that the Huffman ruling would accomplish the same purpose.

U.S. 974, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974). (See "Petition for Rehearing" in the Huffman case at "Subject Index" and "Reasons for Granting a Rehearing" and Jurisdictional Questions 1 and 2 at Appendix pages G2-G26 and G-14 and G-15 to this Amicus Brief. As Counsel for the Appellant in those arguments, Amicus argued without success (to Associate Justice Stewart): (1) that, in view of what was happening throughout this Nation, the jurisdictional question as to "subject matter jurisdiction" was paramount and must be answered even before the Court could get to the Younger abstention issue and whether or not it was to be extended to Civil lawsuits, and (2) that a decision extending Younger abstention in criminal cases to a Civil public nuisance abatement lawsuit would not satisfy the duty of this court to address and decide the "subject matter" Jurisdictional Questions which had been

framed in Huffman. See Reporter's Transcript of the oral arguments on December 10, 1974, in Huffman v. Pursue, Ltd., No. 73-296.

The "Huffman" abstention principle should be reexamined and clarified.

(2). THE "VIXEN" APPEAL (CIVIL CASE)

Such also was the case in the appeal in Film Entited "Vixen" v. Ohio ex rel. Charles H Keating, Jr., 413 U.S. 905, 37 L.Ed.2d 1016 (1973), with respect to this Court's neglect, 17 years ago, to address and resolve the same "public indecency" constitutional question which is now before this Court, when it was squarely brought to this Court on Appeal in the Petition for Rehearing by Appellee Charles H Keating, Jr. in that case. See Appendix E to this Brief.

In the Vixen case the Hamilton County, Ohio (Cincinnati) trial court had enjoined the exhibit of Vixen as an

obscene film and a public nuisance. On the Appeal, and on a Petition for Rehearing, the Ohio Supreme Court refused to rule on the obscenity issue, but instead, in the face of a first amendment challenge, enjoined the exhibition and ordered the excision of the integral acts of indecency throughout the film which were shown on the screen, holding (see Petition for Rehearing in Vixen at Appendix E-9 to this Brief):

> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse ...."

On his Appeal to this Court, Appellant Russ Meyer, the producer of "Vixen," framed Jurisdictional Question 1 in essentially the same form and substance as the Jurisdictional Question which is before this Court:

> "(1) Whether the public exhibition for commercial exploitation of individual scenes depicting on the

> motion picture screen actual or purported acts of sexual intercourse, the cumulative effect of which is a tendency to appeal to prurient interest, can be enjoined by a state court as a public nuisance where such scenes are only a part of the whole motion picture film? (Our emphasis.)

On the Petition for Rehearing, following this Court's refusal to decide that Question on Appeal (See Appendix E at Subject Index and pages E-1 through E-3), this Court would not hear that issue, even though it was, in 1973, the same burning issue that now faced the en banc Court of Appeal below.

The Vixen civil appeal in 71-599 remained on the docket of this court without decision for 20 months, from October 29, 1971 through June 25, 1973. During that period, this Court granted a writ of certiorari in Rabe v. Washington, October Term 1971, No. 71-247, a criminal case, involving the same issue which faces this Court in the civil appeal in Barnes v. Glen Theatre.

(3). THE "RABE" WRIT OF CERTIORARI

(CRIMINAL CASE)

In Rabe v. State of Washington, No. 71-247 the Washington State Supreme Court had affirmed the conviction of a drive-in theater for exhibiting lewd conduct upon the public screens in violation of R.C.W. section 9.68.010 which read in part as follows (see Appendix C-2 to this Amicus Brief):

> "9.68.010 Obscene literature, Shows, etc. Every person who - (1) Having knowledge of the contents thereof shall exhibit ... any ... motion picture film ... picture ... image, or any object or thing which is obscene ... shall be guilty of a gross misdemeanor."

The findings of fact and conclusions of law of the trial judge were as follows (see Appendix C-7 and C-8 to this Amicus Brief):

> "FINDINGS OF FACT
> "I.
> "That on August 25, 1968, through Aug. 29, 1968, the motion picture film 'Carmen Baby' was exhibited at the Park Y Drive-In Theater in Richmond, Benton County, Washington, which was managed by the defendant, William Rabe.
> "II.
> "That said Park Y Drive-In Theater faces a residential area of the

City of Richmond and an overpass providing a clear view of the screen to residents of the area and passing motorists.

"III.

"That individual portions or scenes of the movie have a dominant theme which appeals to a prurient interest in sex, is patently offensive because it confronts contemporary community standards relating to the representation of sexual matters and is utterly without redeeming social value.

"IV.

"That passing motorists and residents outside the theater are in a position to see only individual portions or scenes of the movie."

"From the foregoing finding of facts the court makes the following:

"CONCLUSIONS OF LAW

"....

"II.

"Individual portions or scenes of the movie 'Carmen Baby' are obscene and to passing motorists or persons and residents outside the theater, those individual scenes become a movies by themselves."

On April 6, 1971, the Supreme Court of the State of Washington affirmed in Washington v. Rabe, 484 P.2d 917, see Appendix C to this Amicus Brief at C-8 and C-9, which considered and rejected the petitioner's argument that this Court's prior rulings precluded an

obscenity conviction where obscene material was exhibited on the public screen at an outdoor motion picture drive-in, which was open to the view of neighborhood residents and audiences on the public highway unless the dominant theme of the motion picture film, taken as a whole, appealed to prurient interest. This Court reversed the criminal conviction on procedural grounds that Rabe had not had fair notice consistent with due process, but said nothing about the real issue therein present, which cried out for resolution in 1972, and avoided addressing that issue in the Civil context, as presented to this Court in the Vixen Appeal.

Thereafter, Appellant Charles H Keating, Jr. and this Amicus Curiae as co-author in a "Brief Amicus Curiae of Charles H Keating, Jr. in Support of Respondents Petition for Rehearing" in the Rabe case (see Appendix C-1 through

C-42 to this Amicus Brief), and in a "Supplemental Brief in Support of Motion to Affirm" in the Vixen appeal (see Appendix C-1 et seq. to this Amicus Brief), requested this Court, without success, to reexamine its decision in Rabe (which reversed the criminal conviction on the procedural point of "notice") and ignored the fundamental Constitutional Question and principles of law which had been expressed by the Supreme Court of Washington in the criminal context and by the Supreme Court of Ohio in the Civil context.

(4). THE MITCHELL BROTHERS SANTA ANA THEATER PETITIONS FOR WRITS OF CERTIORARI (CIVIL CASE).

Such also was the result in Cooper v. Mitchell Brothers' Santa Ana Theatre, 454 U.S. 90, 70 L.Ed.2d 262, 102 S.Ct. 172 (1981), where Amicus Curiae herein, acting as attorney of record for the City of Santa Ana, attempted for 10

years, to resolve the same "closure" constitutional issue which the federal trial court's interference in Huffman v. Pursue, Ltd., in 1972, and the refusal of this Court to act in the Vixen case in 1972, had prevented from being answered in the State of Ohio appellate litigation. The resultant harm to the citizens of Santa Ana was inordinate. See Appendix H to this brief at pages 1-16, containing a copy of a Petition for Rehearing after this Court denied a third petition for writ of certiorari which sought a hearing on the "closure" issue, which this Court in U.S. Marketing, Inc. et al. v. Idaho, 445 U.S. 110 (Jan. 11, 1982) had held constituted a substantial federal question which was ripe for review. When a real estate developer promised to "redevelop" the theater out of existence in a redevelopment project, the City Council, after spending close to $500,000, threw up its hands and

compromised the public nuisance abatement effort by paying the Mitchell Brothers $200,000 for their attorneys' resistance, and permitting them to continue their operations.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' Civil Rights Action should be dismissed for lack of subject matter jurisdiction and for failure to state a claim (subject matter) upon which relief can be given.

Irrespective of whether or not a state case is pending, jurisdiction to interpret and apply the meaning and scope of a state statute involving an important state interest (the right to control public indecency under the police power) which is constitutionally valid on its face, to specific activity of Plaintiffs, is exclusively in the state courts pursuant to the 11th Amendment, and, in entertaining a civil

rights action which challenges such application, a federal court's jurisdiction is limited to "jurisdiction to determine jurisdiction," and if it determines that the Plaintiffs' activity is "conduct" and is not "speech" under the First Amendment as a matter of law, it must dismiss the federal civil rights action for lack of "subject matter" jurisdiction and failure to state a claim upon which relief can be granted or order that the civil complaint be filed in the State Court.

Dated: December 4, 1990

Respectfully Submitted,

JAMES J. CLANCY
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 1990, the original and 40 copies of the within Amicus Curiae Brief were deposited in the United States Post Office in Van Nuys, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served:

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Dated: December 22, 1990

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